

STATE OF MICHIGAN
COURT OF APPEALS

DAVID A. VILLARREAL,

Plaintiff-Appellant,

v

FRANK M. FRONTCAK,

Defendant-Appellee.

UNPUBLISHED

August 10, 1999

No. 204495

Saginaw Circuit Court

LC No. 96-016906 NM

Before: McDonald, P.J., and Kelly and Cavanagh, JJ.

PER CURIAM.

Plaintiff David A. Villarreal appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10)¹ in this appellate malpractice action. We affirm.

In 1993, plaintiff pleaded guilty of one count of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and no contest to two counts of first-degree CSC, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Plaintiff was sentenced to concurrent prison terms of five to fifteen years for the second-degree CSC count and twenty to forty years for the two counts of first-degree CSC. In the present case, plaintiff alleges that defendant negligently handled his criminal appeal.

On appeal, an order granting or denying summary disposition is reviewed de novo. *Lown v JJ Eaton Place*, ___ Mich App ___, ___; ___ NW2d ___ (Docket No. 205937, issued 6/4/99), slip op p 3. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, ___ Mich ___, ___; ___ NW2d ___ (Docket No. 110065, issued 7/13/99), slip op pp 8-9.

To establish a prima facie case of legal malpractice, a plaintiff must show (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the

negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).

Plaintiff argues that the trial court erred in finding no genuine issue of material fact regarding whether defendant was negligent in his representation of plaintiff. We agree. The record shows that defendant did not timely move to remand for an evidentiary hearing on whether plaintiff received effective assistance of counsel in the trial court and to withdraw his plea. The record also reveals that defendant did not visit plaintiff until approximately eight months after he had received the assignment. The Michigan Appellate Assigned Counsel System and the Attorney Grievance Commission both concluded that defendant's representation was deficient. On this record, there is a genuine issue of material fact regarding whether defendant was negligent.²

Nevertheless, we conclude that the trial court did not err in granting defendant's motion for summary disposition because plaintiff failed to present any evidence that the alleged negligence was a proximate cause of an injury. *Simko, supra*. Plaintiff had the burden of showing that "but for" defendant's negligence, he would have been successful in the underlying appeal. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994).

Plaintiff contends that if defendant had argued that plaintiff was incompetent to enter his pleas, he would have succeeded in his appeal. However, plaintiff has offered no evidence to establish that he was incompetent when he entered his pleas. Moreover, plaintiff has made no showing that he could have received a better result had defendant acted differently.

In sum, the trial court did not err in finding that the proximate cause of plaintiff's injury was his pleas to the CSC charges. Cf. *Schlumm v Terrence J O'Hagan, PC*, 173 Mich App 345, 360-361; 433 NW2d 839 (1989). As a result, we conclude that the trial court did not err in granting defendant's motion for summary disposition.

Finally, plaintiff's claim that his due process right to reasonable access to the courts was violated is without merit. While an inmate's right of reasonable access to the courts also includes access for civil matters, *Hall v Hall*, 128 Mich App 757, 759-760; 341 NW2d 206 (1983), the trial court's decision, pursuant to the court rules, to summarily dismiss plaintiff's claim did not deprive him of due process. That plaintiff could file this action and seek redress, even if he did not prevail, indicates that he had reasonable access to the courts.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Gary R. McDonald
/s/ Michael J. Kelly
/s/ Mark J. Cavanagh

¹ Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court did not specify the subrule under which it granted defendant's motion. However, because the trial court did not address defendant's statute of limitation argument and because it appears that it considered documentary evidence in

addition to the pleadings, we presume that summary disposition was granted pursuant to MCR 2.116(C)(10). See MCR 2.116(G)(5); *Shirilla v Detroit*, 208 Mich App 434, 436-437; 528 NW2d 763 (1995).

² Plaintiff also argues that the trial court erred in failing to address the issue of his mental competency at the time his plea was entered. However, because plaintiff failed to sustain his burden of submitting evidence in support of his claim, MCR 2.116(G)(4), we find no error.